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No. 02-1541

In The
Supreme Court of the United States

STATE OF IOWA,

Petitioner,

v.

FELIPE EDGARDO TOVAR,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Iowa

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Does the Sixth Amendment require a court to give a rigid and detailed admonition to a non-indigent *pro se* defendant pleading guilty of the usefulness of an attorney, that an attorney may provide an independent opinion whether it is wise to plead guilty, and that without an attorney the defendant risks overlooking a defense?

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OPINIONS BELOW

The Petition for *certiorari* contains the opinion of the Iowa Supreme Court (Pet. App. 1-22), which is also reported at 656 N.W.2d 112 (Iowa 2003). The Petition also contains the earlier rulings on the issue here, by the Iowa Court of Appeals and the Johnson County District Court. Pet. App. 23-30, 33-37.

JURISDICTION

The Iowa Supreme Court ruled on January 23, 2003, reversing Felipe Edgardo Tovar's conviction on the basis of the Sixth Amendment alone. Pet. App. 2, 19. The State petitioned for a writ of *certiorari* on April 18, 2003, which the Court granted on September 30, 2003. Jurisdiction rests on 28 U.S.C. sections 1257(a), 2102.

CONSTITUTIONAL PROVISION, STATUTES, AND RULES INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel in his defence.

U.S. Const. amend. VI.

The appendix to this brief contains the rule for accepting guilty pleas, Iowa Rule Criminal Procedure 8 (1992), and the statute prohibiting operating a vehicle while intoxicated (OWI), Iowa Code sections 321J.1 and 321J.2 (1995). These versions were in effect at the time Tovar pleaded guilty in 1996.

The Petition contains those relevant portions of Iowa Code section 321J.2 and Iowa Rule of Criminal Procedure 2.8 which were in effect at the time Tovar was convicted of third offense OWI. Pet. 3-4.

STATEMENT

Respondent, Felipe Edgardo Tovar, was found guilty by an Iowa district court of Operating While Intoxicated (OWI), third offense, and of driving while license barred. Pet. App. 33. He appealed his OWI conviction, alleging the district court erred in using his first OWI conviction (in 1996) to enhance his current conviction. *Id.* at 2. Specifically, he claimed that his first OWI conviction resulted from an uncounseled guilty plea for which there was an invalid waiver of counsel. *Id.* The Iowa Court of Appeals affirmed the conviction. *Id.* at 30. The Iowa Supreme Court reversed, holding that the information that the 1996 court provided Tovar was inadequate to ensure a knowing, voluntary and intelligent waiver of counsel as required by the Sixth Amendment. *Id.* at 18-19. At issue in this case is what admonitions the Sixth Amendment requires trial courts to give defendants who choose to plead guilty *pro se*.

Facts

1. On November 2, 1996, Tovar drove while intoxicated in Ames, Iowa. J.A. 23. Two weeks later, on November 18, 1996, he appeared for arraignment in Story County, Iowa. *Id.* at 7-8. Tovar appeared with four other men who were pleading guilty to misdemeanor charges. *Id.* at 6-10. The others' charges included marijuana possession, driving while license suspended, and operating while intoxicated. *Id.* Since the plea hearings would be similar, the court asked to combine the hearings and all agreed. *Id.* at 11.

The court then commenced a guilty plea colloquy pursuant to Iowa Rule of Criminal Procedure 8(2)(b). *See* App. 1-2. Addressing Tovar, the plea court stated: "I see, Mr. Tovar, that you waived application for a court appointed attorney. Did you want to represent yourself at today's hearing?" J.A. 8-9. Tovar replied, "Yes, sir." *Id.* at 9. Tovar also said he would "waive the reading" of the trial information. *Id.*

Upon inquiry from the court, Tovar stated he was 21, in college, could read and write English, and was not under the influence of any drug or alcohol. *Id.* at 12-13. He also affirmed that no one had promised him anything or threatened him in any way to plead guilty. *Id.* at 14. The court then went on to say:

> Gentlemen, before I can accept your pleas of guilty, I need to take some time this afternoon and explain to you what your rights are, make sure you understand those rights, and make sure you understand what rights you will be giving up

> by pleading guilty. If at any time during these proceedings you do not understand something, please feel free to interrupt me and tell me that and I will be happy to explain to you what it is you did not understand. Also, if at any time during these proceedings you change your mind and you decide you no longer want to plead guilty, just tell me that, I will stop the proceedings in your case and anything that you might have said up to that point in time could not be used against you at your trial.

Id.

Tovar said that he understood when the court explained he was entitled to a speedy and public trial by jury; by pleading guilty he would give up his right to a trial of any kind. *Id.* at 15. He understood that at trial he had the privilege against self-incrimination and if he chose not to testify, the prosecution could not comment on that fact to the jury. *Id.* at 16.

On the other hand, the court explained:

> If you would enter a plea of not guilty, not only would you have a right to a trial, you would have a right to be represented by an attorney at that trial, including a court appointed attorney. That attorney could help you select a jury, question and cross-examine the State's witnesses, present evidence, if any, in your behalf, and make arguments to the judge and jury on your behalf. But, if you plead guilty not only do you give up your right to trial, you give up your right to be represented by an attorney at that trial.

Id. at 16.

By pleading guilty, the court explained, Tovar would lose the presumption of innocence, the opportunity to force the State to prove his guilt beyond a reasonable doubt, the right to confront witnesses against him, and to force witnesses to testify in his behalf. *Id.* at 17-19. Knowing this, he still wished to plead guilty. *Id.* at 19.

The court then discussed the range of punishments Tovar faced. Tovar was charged with first offense OWI, a serious misdemeanor punishable by a year's incarceration and a $1,000 fine. *Id.* at 8, 20; *see* Iowa Code § 321J.2(2)(a) (1995) at App. 2. The offense carried a mandatory minimum two days' incarceration and a $500 fine. Iowa Code § 321J.2(2)(a) at App. 3.

The court explained (and Tovar again indicated he understood) that:

> [b]efore I can accept your pleas of guilty, I need to be satisfied that you are in fact guilty of the offense you are pleading to. And, I do that by satisfying myself that you have committed the elements of the offense and I need to spend a little bit of time now with each of you individually and explain to you what the elements are and determine whether or not you committed those elements.

Id. at 21-22.

With respect to Tovar, the court explained:

> That charge just has two elements to the offense. The first element is that on the date listed in the trial information you were operating a motor vehicle in the State of Iowa. The second element of the offense is that when you did so, you were intoxicated. Now, under the law of the State of

> Iowa, there are two definitions of intoxication and you may fit one or both of those definitions. One way to be intoxicated is to have had a blood or breath alcohol concentration of .10 percent or more in your body at the time you were driving. The other way to be intoxicated is to be under the influence of alcohol, which means that the consumption of alcohol has affected your judgment or your reasoning or your faculties or it has caused you to lose control in any manner or to any degree of the actions or motions of your body.

Id. at 23.

Tovar admitted that he had consumed alcohol before driving on Lincoln Way, in Ames, Iowa on November 2, 1996 and that his blood alcohol was .194 percent. *Id.* at 24. Although this exceeded the legal limit nearly twice over, Tovar thought the alcohol had no effect on him. *Id.*; *see* Iowa Code § 321J.2(1)(b) at App. 2.

Before finally accepting the plea, the court asked the County Attorney if there were any legal reasons to reject the plea who said there were none. J.A. 28.

The court accepted Tovar's plea as made with full knowledge of his rights and the consequences. *Id.* at 28. It then explained several appeal rights and asked if Tovar wished to be sentenced immediately. *Id.* at 28-29.

Tovar wished to be sentenced later. *Id.* at 29. He then drove from the courthouse, was stopped, and later was charged with driving while under suspension. *Id.* at 45-46, 50, 53; *see* Iowa Code § 321J.21 (1995).

2. Tovar returned five weeks later to the Story County courthouse for sentencing on the OWI offense and

arraignment for driving while under suspension. *Id.* at 45-46. Here it became clear that Tovar was not indigent.

> THE COURT: . . . Mr. Tovar, I note that you are appearing here today without having an attorney present and you waived application for a court appointed attorney. I am sorry. You applied, but it was denied due to the fact you are dependent upon your parents. Mr. Tovar, did you want to represent yourself at today's hearing or did you want to take some time to hire an attorney to represent you?
>
> THE DEFENDANT: No, I will represent myself.

Id. at 46. The court then went through much of the Rule 8(2)(b) colloquy that occurred in the earlier matter. *Id.* at 46-51. Tovar affirmed that he understood his rights and that there was a factual basis for this second charge. *Id.* at 50-51. The court accepted Tovar's guilty plea for driving with a suspended license. *Id.* at 51.

Before sentencing on the driving while under suspension offense, Tovar explained that he had driven himself to court for the OWI plea to avoid being held in contempt. *Id.* at 53.

Given Tovar's youth and lack of criminal history, the court sentenced Tovar to the mandatory minimum of two days in jail and a $500 fine for the OWI first offense. *Id.* at 54-55. The court allowed Tovar to schedule his own time to serve the two-day sentence. *Id.* at 56.

Procedural Posture

1. Four years later, on December 14, 2000, the Johnson County Attorney charged Tovar with third offense OWI, a class "D" felony under Iowa Code section 321J.2(2)(c) (1999). Pet. App. 38-39.

That spring, Tovar sought to prohibit the Johnson County District Court from using his first OWI conviction from Story County, Iowa, to enhance his offense from an aggravated misdemeanor to a class "D" felony. *Id.* at 3-4; *compare* Iowa Code § 321J.2(2)(b) *with* subsection (c) (1999). His sole claim was that the 1996 conviction was uncounseled. J.A. at 3-4.

The parties stipulated to the introduction of two transcripts from Tovar's 1996 conviction. *Id.* at 62. Based on these transcripts, the Johnson County District Court denied Tovar's application. Pet. App. 35-37.

On May 24, 2001, Tovar stipulated to a bench trial on the minutes of testimony. J.A. 65-66. The court convicted Tovar of third offense OWI and driving while license barred. Pet. App. 33-34; *see* Iowa Code §§ 321J.2(2)(c), 321.561 (1999). The Court later sentenced Tovar to a 180-day jail term (all but 30 days suspended), three years' probation, and a $2,500 fine plus surcharges. J.A. 71-72.

2. Tovar appealed the OWI conviction and the Iowa Court of Appeals affirmed. Pet. App. 30. The court concluded that in 1996 Tovar was sufficiently aware of his right to have counsel present and the possible consequences of forgoing counsel. *Id.* at 29.

3. The Iowa Supreme Court reversed. *Id.* at 2. In a 4-3 decision, the Court held it could not conclude from the record that Tovar understood the usefulness of counsel or

the dangers and disadvantages of proceeding *pro se*. *Id.* at 19. The court held that although a plea court need not assume the role of an attorney and discuss various available defenses, a court must admonish the defendant of the usefulness of an attorney, the dangers of self-representation, the charges and range of punishments, that an attorney may provide an independent opinion whether it is wise to plead guilty, and that without an attorney the defendant risks overlooking a defense. *Id.* at 18-19.

To reach this conclusion, the majority looked to the Ninth Circuit's holding with respect to waivers of counsel in misdemeanor domestic abuse cases. *Id.* at 17; *see Akins v. United States*, 276 F.3d 1141 (9th Cir. 2002). The Ninth Circuit held that, for purposes of later firearms possession charges, it will not countenance an earlier *pro se* guilty plea unless that plea was accompanied by a separate colloquy discussing the dangers and disadvantages of self-representation. *Akins*, 276 F.3d at 1147; *see* 18 U.S.C. § 922(g)(9) (prohibiting weapons possession by those previously convicted of misdemeanor domestic violence). The Ninth Circuit stated – and the Iowa Supreme Court agreed – that "[t]he defendant may be 'guilty' in a layman's sense, and so be willing to confess, and yet may have a viable defense that he ought to invoke, or may be pleading guilty to the wrong grade of crime." *Akins*, 276 F.3d at 1148; *see* 18 U.S.C. § 921(a)(33)(B)(i) (requiring knowing and intelligent waiver of counsel).

Three members of the Iowa Supreme Court dissented. They stated that the majority ruling unnecessarily depreciated the consequences of a settled conviction, entered upon a solemn admission of guilt in open court. Pet. App. 19. The dissent asserted such a result should obtain only

on a convincing showing the defendant was not guilty in the earlier proceeding or on compelling federal authority. *Id.* at 20. The dissenting members believed that under *Patterson v. Illinois*, 487 U.S. 285, 298 (1988), Tovar's waiver of counsel was valid given his awareness of the adverse consequences of his actions through the guilty-plea admonition. *Id.* at 21.

SUMMARY OF ARGUMENT

When a court is already engaging a defendant in a detailed guilty plea colloquy, the Sixth Amendment does not require a separate litany for waiver of counsel. The plea colloquy makes a defendant sufficiently aware of the relevant circumstances and likely consequences of going forward without counsel. The judgment of the Iowa Supreme Court should therefore be reversed.

1. A defendant may waive constitutional rights so long as the waiver is "knowing and intelligent." *Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938). In determining whether defendants have acted in a "knowing and intelligent" manner, this Court has taken a pragmatic approach, instructing that the procedures for waiver fit the complexity of the task confronting the defendant. To the extent courts are required to provide information to defendants, it is simply to assure the defendant is acting with "eyes open." *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942).

Furthermore, defendants who waive their constitutional rights are not entitled to be informed of all relevant subsidiary facts. Rather, the knowledge of relevant circumstances and likely consequences a defendant must

possess does not mean *complete* knowledge or *full* appreciation of the consequences. *United States v. Ruiz*, 536 U.S. 622, 623 (2002); *Patterson v. Illinois*, 487 U.S. 285, 294 (1988). Adequacy, not perfection, measures the constitutional validity of waiver of counsel procedures. And, as to waivers of the right to counsel specifically, defendants need be aware only of the right to have counsel present and the "ultimate adverse consequence" of going without counsel. *Patterson*, 487 U.S. at 294. The specific information that should be conveyed to a defendant to ensure he has that awareness depends on the context, i.e., whether defendant forgoes counsel at trial, at arraignment, or some other phase of a criminal proceeding.

2. A plea colloquy is more than adequate to ensure a valid waiver of counsel, particularly under the facts of this case. The plea colloquy at arraignment offers a ready mechanism for conveying the stakes of proceeding without counsel, and conversely, the tasks with which an attorney could assist a defendant.

The present-day plea colloquy ensures a defendant's understanding of a host of rights, privileges, and consequences. During a plea colloquy, the court advises the defendant of the right to counsel, the nature of the offense charged, the maximum and minimum possible punishments, as well as the full panoply of trial rights the defendant forgoes by pleading guilty. *See* App. 1-2; Pet. 3-4. The court also will engage the defendant in a full discussion of the factual basis for the charge, involving the elements of the offense and the defendant's version of what occurred. App. 1; Pet. 4. A complete plea colloquy, such as Tovar received, protects the innocent from pleading guilty to the wrong crime or grade of offense. *See Ruiz*, 536 U.S. at 631.

3. A mandatory, separate waiver of counsel colloquy is not necessary, let alone required by the Constitution, especially given the heavy volume of misdemeanor guilty pleas and enhanceable offenses. When enhancement statutes are involved, requiring an evaluation of a separate waiver of counsel colloquy entails a burdensome record search, searches that often will prove frustrating given the great numbers of misdemeanors and the widely varying recordkeeping practices of police and magistrate courts from which many of these convictions emerge. Nullifying prior convictions for lack of a rigid colloquy marks an unnecessary inroad into the finality of convictions.

Nor would imposing such a waiver of counsel colloquy yield substantial prophylactic benefits. It offers reversible error for the *pro se* defendant who does not question his guilt. The colloquy envisioned by the Iowa Supreme Court – when given alongside a valid guilty plea – conveys no more than what the public knows already: that defense attorneys can try to reduce or eliminate criminal liability.

While the State has no preference for *pro se* guilty pleas, lengthening the plea process for comprehensible, minor offenses does not always serve the legitimate interests individuals have in speedy disposition of simple charges. Moreover, the courts should not discourage a defendant's ready admission of guilt by holding out the prospect of an unknown defense. Doing so delays the rehabilitation process and draws out expense and difficulty for the defendant and his family.

4. Applying these principles here, the record demonstrates Tovar understood what self-representation meant to him. He knew he could have counsel present. He knew

the full range of his constitutional rights, what his crime was, what he did, and the consequences he faced. The Sixth Amendment does not require invalidation of his 1996 guilty plea for enhancement purposes.

ARGUMENT

A. A Valid Guilty Plea Colloquy Provides Sufficient Information For A Non-Indigent Defendant To Make A Voluntary, Knowing, and Intelligent Waiver of Retained Counsel.

1. Defendants validly waive constitutional rights, including the right to counsel, when they are aware of the relevant circumstances and likely consequences of the waiver.

Waiver is an intentional relinquishment of a known privilege. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Such knowing and voluntary waivers occur when made with "sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970); *see also Boykin v. Alabama*, 395 U.S. 238, 242 (1969). The sufficiency of this awareness depends on the facts of each case, including the background, experience, and conduct of the accused. *Zerbst*, 304 U.S. at 464.

The principle underlying *Zerbst* and its progeny is that waiver of Sixth Amendment rights is a solemn act, requiring as searching an inquiry as necessary to ascertain the defendant's understanding. *See, e.g., Faretta v. California*, 422 U.S. 806, 835 (1975) (waiver of counsel at trial); *Brady*, 397 U.S. at 748 (waiver of right to trial); *Von*

Moltke v. Gillies, 332 U.S. 708, 723-24 (1948) (plurality opinion) (waiver of counsel and trial); *Zerbst*, 304 U.S. at 464 (waiver of trial counsel). But, this inquiry need only assure that the defendant "knows what he is doing and his choice is made with eyes open." *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942).

The Court's reasoning in *Adams* illustrates the purposes of this well-established principle – and its flexibility. There, Adams complained that because he had waived the assistance of counsel, he could not intelligently waive trial by jury. *Id.* at 278. The court declined to accept such a rigid position. *Id.* at 278-79. The Court explained that despite the importance of constitutional safeguards, to deny a defendant the ability to waive them "is to imprison a man in his privileges and call it the Constitution." *Id.* at 280.

The court prefaced this conclusion by acknowledging the ability of trial courts to consider the varying circumstances of individual cases in assessing waiver. *Id.* As other decisions of this Court bear out, the principle of *Adams* is that the importance of a constitutional right and the court's task to assure valid waiver does not hinder an individual's ability to waive that right. All the trial court can and must do is assure itself the defendant acts with eyes open to relevant circumstances and likely consequences.

By comparison, outright denial of counsel is a "*unique* constitutional defect." *Custis v. United States*, 511 U.S. 485, 496 (1994) (emphasis added). Many laudable reasons exist for an inflexible constitutional standard making retained or appointed counsel available at a critical stage of the proceedings. *See, e.g., Argersinger v. Hamlin*, 407

U.S. 25, 37 (1972) (appointment of counsel misdemeanor defendant); *Powell v. Alabama*, 287 U.S. 45, 68 (1932) (appointment of counsel for capital defendant).

The issue takes on a different character when an affirmative waiver of counsel emerges from the record. *Cf. Williams v. Kaiser*, 323 U.S. 471, 472 (1945) (granting habeas where indigent defendant asked for yet was not given appointed counsel); *Carnley v. Cochran*, 369 U.S. 506, 513 (1962) (requiring that record show judge offered and defendant affirmatively waived trial counsel).

2. The required warnings and procedures for waiver of counsel vary according to the complexity of services an attorney can provide at that stage.

This Court has looked at waivers pragmatically to determine what warnings and procedures are necessary given the purposes a lawyer can serve at the proceeding. *Patterson*, 487 U.S. at 298. Where an attorney has an enormously complicated and important role, such as at trial, the Court has imposed "the most rigorous restrictions on the information that must be conveyed to the defendant, and procedures to be observed before permitting" waiver of trial counsel. *Id.* (citing *Faretta v. California*, 422 U.S. 806 (1975)). Accordingly, waiver of trial counsel requires an especially searching inquiry into the disadvantages of self-representation. *Faretta*, 422 U.S. at 835.

Short of trial, the court's duty to assure a knowing waiver depends on a pragmatic assessment of an attorney's usefulness to the accused at that stage and the dangers of proceeding without counsel. *Patterson*, 487 U.S. at 298. If a defendant understands these "basic facts," the waiver is valid. *Id.*

Patterson addressed post-indictment police questioning where an attorney serves an important, yet relatively limited role, "advising his client as to what questions to answer and which ones to decline to answer." *Id.* at 294 n.6. Thus, a less searching, formal inquiry assures the validity of waiver of counsel. *See id.* at 299-300. An advisory of Fifth Amendment rights under *Miranda v. Arizona*, 384 U.S. 436 (1966) suffices to alert the accused of the right to counsel and to "the ultimate adverse consequence by virtue of the choice" to proceed without counsel. *Patterson*, 487 U.S. at 293-94, 299-300. These warnings let the defendant know both "what a lawyer could do for him" (namely advise which questions to answer) and the ultimate adverse consequence of making a statement. *Id.* at 294.

The lessons to draw from *Patterson* are that advisories can inform a waiver of more than one right in more than one context. Also, the sufficiency of these warnings varies with the complexity of the task confronting the defendant. This is consistent with the Court's broader waiver jurisprudence allowing trial courts to tailor the rigorousness of the waiver inquiry to the circumstances of the case.

3. An incomplete or faulty understanding of the services an attorney provides does not undermine a waiver made with a full appreciation of the ultimate adverse consequence of self-representation.

Patterson also discussed the principle, widely held, that if a defendant "nonetheless lacked 'a full and complete appreciation of the consequences flowing' from this waiver, it does not defeat the State's showing that the information it provided to him satisfied the constitutional minimum." *Id.*; *cf. Oregon v. Elstad*, 470 U.S. 298, 316-17 (1985).

Waivers of known rights will stand when the defendant understands the relevant circumstances and likely consequences of the waiver. *Brady*, 397 U.S. at 758. Absent misrepresentation by state agents, the waiver remains knowing and intelligent even though the defendant does not know many of the things an attorney can do for him or even though the plea rests on a faulty premise altogether. *Brady*, 397 U.S. at 757 (citing *Von Moltke v. Gillies*, 332 U.S. 708 (1948)).

Neither the Fifth nor the Sixth Amendment requires a discussion with a suspect or accused of the useful services an attorney can provide. Some of these useful services include managing the incriminating and exculpatory information a defendant reveals, possibly negotiating plea bargains or staving off criminal charges altogether, examining the charging document for legal sufficiency, preparing pre-trial motions, negotiating plea bargains, and asserting affirmative defenses. *See Patterson*, 487 U.S. at 307-08 (Stevens, J., dissenting). A discussion of an attorney's usefulness may, in the exercise of the court's discretion,

prove wise. Respectfully, the Constitution does not require it.

This Court's recent decision in *United States v. Ruiz* underscores the strength of this principle. *Ruiz* repeated the Sixth Amendment requirement that the defendant understand the "relevant circumstances and likely consequences" of waiver. *United States v. Ruiz*, 536 U.S. 622, 629 (2002) (quoting *Brady*, 397 U.S. at 748). The Court observed: "a defendant's awareness of the relevant circumstances[ ] does not require *complete* knowledge of the relevant circumstances." *Ruiz*, 536 U.S. at 630 (emphasis added). The Constitution does not require invalidation of a plea "despite various forms of misapprehension under which a defendant might labor." *Id.*

In support of this position, the Court drew from thirty years of precedent. *See id.* at 630-31 (citing *United States v. Broce*, 488 U.S. 563, 573 (1989) (counsel failed to point out potential defense); *Tollett v. Henderson*, 411 U.S. 258, 267 (1973) (counseled guilty plea remains valid even if the defendant is unaware of every "plea in abatement"); *Brady*, 397 U.S. at 757 (counseled defendant "misapprehended the quality of the state's case," misapprehended "likely penalties," and failed to "anticipate a change in the law"); *McMann v. Richardson*, 397 U.S. 759, 770-71 (1970) (counsel misjudged admissibility of confession)). Additional precedent supports this position. *See Parker v. North Carolina*, 397 U.S. 790, 797 (1970) (holding counseled guilty plea unreviewable on *habeas* despite being motivated by constitutionally suspect statutory penalty).

The pleas in *Ruiz*, *Brady*, *Tollett*, *McMann*, and others were allowed to stand because ignorance of subsidiary information does not diminish awareness of the ultimate

relevant facts and consequences of waiver. These forms of misapprehension do not diminish either the defendant's knowledge of his own actions or his solemn admission in open court. *See Ruiz*, 536 U.S. at 623; *Tollett*, 411 U.S. at 267; *Brady*, 397 U.S. at 757. Thus, even though some information such as exculpatory information or possible defenses may be critical to a defendant's personal decision to plead guilty, a court need not inform the defendant of it. A defendant essentially knows what an attorney can do when the defendant understands that pleading guilty means conviction and knows retained or appointed counsel can assist. The defendant knows an attorney can work on the issues of guilt and sentencing. *See Patterson*, 487 U.S. at 294. The Constitution mandates no more.

In *Carter v. Illinois*, 329 U.S. 173, 178-79 (1946), the Court held that the Constitution did not require a detailed discussion with the accused of the "various degrees" of offense or the "various defenses" to enter a valid guilty plea.

Two years later, in a case involving a complicated indictment for a capital offense and erroneous legal advice by government attorneys, a plurality of this Court discussed a higher standard for waiver of counsel and trial. *Von Moltke*, 332 U.S. at 723-24. Recognizing the complexity of the charge determined the level of inquiry, the plurality stated a waiver of counsel and trial:

> must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter.

Von Moltke, 332 U.S. at 724 (Black, J., plurality opinion). Although some of the plurality's factors have found purchase among lower courts, the broader rule asks whether the defendant understands the ultimate adverse consequences of proceeding without counsel. *See Patterson*, 487 U.S. at 293-94.

A plea colloquy serves that function. It informs the *pro se* defendant that confessing guilt means certain conviction. The plea colloquy ensures defendant's understanding of the charges, terms, punishment within a certain range, and forgone trial rights, including the right to trial by jury, subpoena power, and privilege against self-incrimination. *See Henderson v. Morgan*, 426 U.S. 637, 646 (1976) (requiring plea court to explain charges and elements of offense); *Boykin*, 395 U.S. at 243 (requiring plea court to discuss privilege against self-incrimination, trial by jury and confrontation rights). Although the Iowa Supreme Court disagreed, a majority of lower courts that have considered the question require no more than a valid guilty plea to convey the necessary information to assure a knowing and voluntary waiver of counsel. *See* App. 4-7; Pet. 14-19; Reply for Pet. 3-5; *see also* 3 Wayne R. LaFave, Jerold H. Israel, Nancy J. King, *Criminal Procedure* § 11.3(b), p. 542 (1999) ("*Von Moltke* is generally viewed as not establishing strict constitutional requisites even" in guilty pleas at arraignment).

The "knowing and voluntary" standard for a guilty plea assures that "the defendant actually *does* understand the significance of the consequences of a particular decision and whether the decision is uncoerced." *Godinez v. Moran*, 509 U.S. 389, 401 n.12 (1993) (emphasis in original) (citing *Faretta*, 422 U.S. at 835; *Adams*, 317 U.S. at 279; *Boykin*, 395 U.S. at 244). Knowing the circumstances

of a guilty plea and the consequences of pleading without counsel satisfies the Constitutional minimum.

The Constitution does not demand a more technical procedure. This Court has eschewed "delusively simple rules of trial procedure which judges must mechanically follow," focusing rather on what information the defendant actually had – as shown by the totality of circumstances – to ascertain whether the defendant acted with "eyes open." *Adams*, 317 U.S. at 279; *see United States v. Hill*, 252 F.3d 919, 928 (7th Cir. 2001) (Easterbrook, J.) (noting *Zerbst*, *Adams*, and *Faretta* asked what the defendant understood "not whether the judge used a check-off list" because "lists do not convey knowledge or change minds").

4. Compared to trial, an attorney plays a less active role at a plea hearing which is procedurally less complex; the substance of a waiver of counsel colloquy is therefore simpler.

Another aspect to consider when judging the sufficiency of a waiver is the complexity of the proceeding. A trial, of course, is the most demanding setting. There, the Court has imposed the most rigorous standards for information and procedure, and understandably so. *Patterson*, 487 U.S. at 298; *see Faretta*, 422 U.S. at 835. Self-representation at trial hazards numerous pitfalls. Generally speaking, laypersons do not have specialized training in conducting an adversarial hearings. *Patterson*, 487 U.S. at 294 n.6; *Faretta*, 422 U.S. at 834. Even the gifted layperson can struggle with rules of procedure and evidence, jury *voir dire*, examination and cross-examination of witnesses, lodging objections, and more. *Patterson*, 487 U.S. at 300 n.13.

Unlike a plea proceeding, trial procedure does not itself convey in neat form the elements of the offense and the range of punishments nor imply basically what an attorney will do. Accordingly, a *Faretta*-type colloquy is necessary to discuss the dangers and disadvantages of proceeding without counsel. *Faretta*, 422 U.S. at 835.

Of course, a court may go too far in warning a defendant away from self-representation.[1] That situation did not happen here because the plea court did not dissuade Tovar from self-representation. And yet, the colloquy that the Iowa Supreme Court has now imposed for waiver of counsel could discourage self-representation. If adopted as

[1] Generally, the prospect of self-representation poses a dilemma for trial judges. *See Strozier v. Newsome*, 871 F.2d 995, 997 (11th Cir. 1989); *see also Martinez v. Court of Appeal of California, Fourth Appellate Dist.*, 528 U.S. 152, 164 (2000) (Breyer, J., concurring) (*noting United States v. Farhad*, 190 F.3d 1097, 1107 (9th Cir. 1999) (stating right to self-representation may conflict with right to fair trial)). Additionally,

> [i]f the judge goes too far in cautioning the defendant against proceeding without the assistance of counsel (as would be the protective tendency), there is the risk of infringing on the defendant's constitutional right of self-representation. If, on the other hand, the trial judge does not counsel the defendant sufficiently in this regard, the defendant may be deprived of his or her constitutional right to the assistance of counsel.

Crane v. Radeker, 580 F.Supp. 2, 4-5 (M.D. Tenn. 1983). In any event, the assertion of self-representation "paves the way for a challenge to any resulting conviction." *Id.* at 5.

The solution the majority of lower courts has found is for the trial court to ensure an unequivocal assertion of self-representation appears in the record as well as the defendant's understanding of the consequences of the decision as revealed by the entire record. *See, e.g., Strozier*, 871 F.2d at 998; *Fitzpatrick v. Wainwright*, 800 F.2d 1057, 1065-67 (11th Cir. 1986). In the context of a guilty plea, a constitutionally valid plea colloquy will provide this record evidence.

the Sixth Amendment standard, such an advisory cements the troublesome dilemma facing trial judges when a person wishes to plead guilty *pro se*.

The rules of procedure for entry of guilty pleas, unlike trial procedure, offer a comprehensible mechanism to confess guilt that a layperson can understand. This is particularly true for drunk driving cases where the elements are readily understood by the public. *See, e.g., State v. Rater*, 568 N.W.2d 655, 660 (Iowa 1997); *State v. Strain*, 585 So.2d 540, 543-44 (La. 1991).

Pleading guilty under current plea-taking procedure is easier and simpler than conducting one's own trial. It is a shorter proceeding. *Godinez*, 509 U.S. at 398-99. The judge guides the defendant through it. *See, e.g.*, Iowa R. Crim. P. 8 at App. 1-2; Pet. App. 4. The defendant does not have to contend with rules of evidence, procedure, trial practice, or jury persuasion. The plea proceeding's outcome is certain while a trial's outcome is uncertain. Although pleading guilty *pro se* is an unquestionably profound and serious act, warranting deliberation, the commensurate structure and detail of a plea colloquy serves the purposes of securing valid waivers of counsel under the Sixth Amendment.

B. The Many Elements Of A Valid Guilty Plea Colloquy Supply Record Evidence Defendant Understood The Relevant Circumstances And Likely Consequences Of Proceeding Without Retained Counsel And Pleading Guilty.

1. Guilty plea colloquies offer ample information to support a waiver of the right to counsel.

A state court must ensure the record shows a defendant understands several rights which a guilty plea

waives: the privilege against self-incrimination, the right to trial by jury, and the right to confront one's accusers. *Boykin*, 395 U.S. at 243. The court must also explain the charges and elements of offense. *Henderson*, 426 U.S. at 646.

By rule in Iowa, a court must ensure a defendant understands numerous other privileges waived by a guilty plea. Under Iowa Rule of Criminal Procedure 8(2)(b), the court must record the defendant's understanding of:

> 1. The nature of the charges to which a plea is offered;
>
> 2. The mandatory maximum and minimum punishments for the offense;
>
> 3. That the defendant has the right to a trial by jury, the assistance of counsel, the right to cross-examine witnesses, the right against self-incrimination, and the right to compulsory process;
>
> 4. That a guilty plea means there will be no trial.

App. 1-2.

Perhaps most important, the court must assure itself that a factual basis exists for the plea. *Id.* This is not unique to Iowa's Rule 8. *See* Fed. R. Crim. P. 11; *see also, e.g., Boykin*, 395 U.S. at 243 n.5; Ariz. Rs. Crim. P. 17.1-17.3; Conn. R. Crim. P. (Super. Ct.) § 39-21; Del. R. Crim. P. 11; Fla. R. Crim. P. 3.172; Tex. Crim. Pro. Art. 26.13 (2003).

An Iowa plea colloquy supplies more than the *Boykin* litany. *See Boykin*, 395 U.S. at 243. It must also ensure the defendant is acting voluntarily, without improper pressure by promises or threats. *See Brady*, 397 U.S. at 754-55. It

reflects most of the factors listed by the plurality opinion in *Von Moltke*, 332 U.S. at 724. But, consistent with *Carter v. Illinois*, the plea colloquy does not require a discussion of specific potential defenses or mitigating circumstances. 329 U.S. at 178.

Significantly, the rule ensures that the plea is more than just voluntary. It requires an explanation of the elements of the offense and a finding that a factual basis exists for the plea – the court cannot accept a plea if the defendant recites facts inconsistent with guilt of the charged offense. *See, e.g., Henderson*, 426 U.S. at 646 (granting relief on *habeas* where defendant pleaded guilty but court did not explain element of intent); *State v. Ohnemus*, 254 N.W.2d 524, 525 (Iowa 1977) (relying on *Henderson* and reversing plea where defendant's statements that he did not enter home with intent to harm anyone negated element of burglary offense and trial court should not have accepted guilty plea).

A guilty plea colloquy, therefore, ensures a valid waiver of counsel: the defendant knows of the right to have retained counsel present, learns the nature of the offense, the range of punishments, and the full panoply of constitutional trial rights and that to go forward with a guilty plea means certain conviction. The defendant therefore enters the plea with "eyes open" to the consequences. *Adams*, 317 U.S. at 279. The plea colloquy makes plain that an attorney's role would be to challenge the charge or sentence. The plea will go forward without counsel to certain conviction and sentence.[3]

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[3] Not surprisingly then, numerous state courts that have addressed the issue have held that plea colloquy warnings suffice for

(Continued on following page)

2. The presence of a valid plea colloquy allays concern that without counsel, the innocent will plead guilty to the wrong crime or grade of offense.

A solid plea colloquy provides record evidence which "diminishes the force of . . . concern that . . . innocent individuals, accused of crimes, will plead guilty." *Ruiz*, 536 U.S. at 631. Here, for example, the Story County Court elicited Tovar's full understanding of the only two elements of this offense: 1) driving within the state 2) while having a blood alcohol content greater than .10 percent. J.A. 23-24. This should alleviate any concern that Tovar was innocent or that this educated young man pleaded to

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waivers of counsel. *See, e.g., State v. Natoli*, 764 P.2d 10, 11-12 (Ariz. 1988) (holding that OWI guilty plea will not be overturned on collateral attack where court advised defendant of right to counsel, defendant waived it, and record appears otherwise valid on its face); *King v. State*, 804 S.W.2d 360, 362 (Ark. 1991) (record that defendant waived "his right to consult with an attorney" created presumption that earlier guilty plea to OWI was valid and could be used for enhancement); *People v. Gonzales*, 446 N.W.2d 296, 298-99 (Mich. Ct. App. 1989) (allowing enhancement of drunk driving offense based on prior plea where defendant understood right to counsel, waived it, and entered guilty plea); *State v. Wolfe*, 75 P.3d 1271, 1272-73 (Mont. 2003) (in enhancement case, holding separate "dangers and disadvantages" discussion in DUI case not necessary so long as waiver is knowing and voluntary); *State v. Werner*, 600 N.W.2d 500, 506-07 (Neb. 1999) (holding waiver form listing elements of DUI offense, punishments and right to counsel shows knowing and intelligent waiver); *State v. Cashman*, 491 N.W.2d 462, 465 (S.D. 1992) (holding that dangers and disadvantages of self-representation are more obvious at a guilty plea to DUI since defendant is fully advised of charges, rights, and punishments).

the wrong grade of crime. *See Tomkins v. Missouri*, 323 U.S. 485, 489 (1945) (counsel must be available to defendant lest the ignorant suffer an excessive punishment).

Generally, the plea colloquy allows the defendant and judge to discuss what defendant did and how it relates to the charges. The truth emerges without litigation, unlike a trial where the truth comes after motion practice, jury *voir dire*, minding the rules of evidence, witness examination and cross-examination, and post-trial motions. *See Patterson*, 487 U.S. at 300 n.13.

In short, the "relevant circumstances" and "likely consequences" for pleading guilty without counsel stand out in sharp relief when a court discusses with a defendant the rights, privileges, and perils of pleading guilty. Furthermore, by fully exploring the elements of offense and the defendant's version of the crime, courts allay concern that the innocent will plead guilty in ignorance. To ask for more, particularly for simple, two-element crimes like OWI, puts form ahead of substance to the detriment of justice.

C. Pragmatic Considerations Relating To The Heavy Volume Of Misdemeanor Guilty Pleas And Enhanceable Offenses Suggest That A Separate, Formal, And Rigid Waiver Colloquy Does Not Serve The Ends Of Justice.

1. The costs of adopting the Iowa Supreme Court's rule for waiver of counsel outweigh the benefits it seeks to provide, particularly in the context of recidivist statutes.

Recidivist statutes, like Iowa Code section 321J.2(2), enjoy a "long tradition" in this country, supported by the

valid public interest in deterring and segregating habitual criminal offenders. *Parke v. Raley*, 506 U.S. 20, 26-27 (1992). A significant body of legislation has emerged to deter repeated criminal activity in Iowa[3] and nationally.[4] *See Ewing v. California*, 538 U.S. 11, ___, 123 S.Ct. 1179, 1202-07, Appendix (2003) (Breyer, J., dissenting) (containing list of sentence enhancement statutes). A constrictive rule – one that limits use of prior offenses for failure to employ a waiver litany not in existence at the time of the plea – will have a significant ripple effect given the high percentage of convictions by plea.

Indeed, "[e]very inroad on the concept of finality undermines confidence in the integrity of our procedures." *United States v. Timmreck*, 441 U.S. 780, 784 (1979); *accord Bousley v. United States*, 523 U.S. 614, 621 (1998) (noting same policy concern in *habeas* context); *Custis*, 511 U.S. at 497 (underscoring same in sentence enhancement

[3] A short list of recidivist statutes in Iowa include Iowa Code §§ 123.46, 123.91 (public intoxication); §§ 124.401, 124.411 (controlled substance possession); §§ 321.555, 321.560 (revocation of driver's license for habitual offenders); § 321J.4 (six-year license revocation for third-time drunk driver); § 692A.1, 692A.2(3) (requiring lifetime registration as sexual offender after second or subsequent qualifying offense); § 708.2A (domestic abuse assaults); § 708.11 (stalking); § 709.11 (sexual assault); § 713.6A(2) (burglary); § 902.8 (minimum sentence for habitual offenders who have been convicted previously of a felony in Iowa, another state, or another federal court); §§ 901A.1, 901A.2 (enhanced punishment for sexually predatory offenses).

[4] The federal system has its own share of enhanceable offenses. *See, e.g.*, 18 U.S.C. § 922(g)(9) (prohibiting weapons possession by persons previously convicted of misdemeanor domestic violence); 18 U.S.C. § 924(c) (enhanced sentence for second or subsequent firearms statute offender); 21 U.S.C. §§ 842, 843, 844a, 849, 851 (enhanced penalties for second or subsequent drug offenders).

case). Such inroads "inevitably delay and impair the orderly administration of justice." *Custis*, 511 U.S. at 497.

Requiring proof of a lengthier discussion on each of the elements discussed by the Iowa Supreme Court entails a significant record search. A simple notation in a judgment roll or minute entry that a defendant had or waived counsel would not suffice. *See Custis*, 511 U.S. at 496. The hunt for transcripts or other evidence would "require . . . courts to rummage through frequently nonexistent or difficult to obtain state-court transcripts or records that may date from another era, and may come from any one of the 50 states." *Id.* at 497, *accord Parke*, 506 U.S. at 25 (noting "considerable effort and expense [of] attempting to reconstruct records from farflung States where procedures are unfamiliar and memories unreliable"); *Nichols v. United States*, 511 U.S. 738, 748 (1994) (noting "large number of misdemeanor convictions take place in police or justice courts which are not courts of record. . . . Without a drastic change in the procedures of these courts, there would be no way to memorialize such a warning").

Given the novelty of the Iowa Supreme Court's rule, the endeavor will likely prove frustrating. Whether "due to the staleness or unavailability of evidence . . . [the] legitimate interest in differentially punishing repeat offenders is compromised." *Parke*, 506 U.S. at 32.

Fortunately, the parties here obtained transcripts from Tovar's 1996 Story County plea and sentencing; they were only four years old at the time. Locating aged transcripts will not always be so easy. Iowa allows enhancement for OWI convictions as old as twelve years. Iowa Code §§ 321.12(4), 321J.2(4). For habitual offender

sentence enhancements, there is no time limit. Iowa Code § 902.8.

Statistics and experience suggest that this difficult task will arise frequently, particularly in enhancement cases. According to one study, nearly thirty percent of jail inmates in the nation's 75 largest counties who are accused of public order offenses (including drunk driving) report self-representation. Caroline Wolf Harlow, *Defense Counsel in Criminal Cases* 1, 7, Table 14 (Bureau of Justice Statistics, November 2000). Less than one percent of felony defendants, on the other hand, represented themselves. *Id.* at 1.

In Iowa alone, there were 20,522 drunk driving filings – or 23% of the entire criminal docket in 2002. Annual Statistical Report of the Iowa Judicial Branch (2002). Of these filings, 18,753 were misdemeanors and 1,769 were felonies. *Id.* If the staggering number of drunk driving arrests nationally is any measure – 1,434,852 in 2001 – states face a daunting prospect when seeking to use prior offenses for enhancement purposes. This volume of cases suggests numerous, difficult forays to locate transcripts or trial court papers from magistrate or municipal courts. *See Sourcebook of Criminal Justice Statistics Online*, Tables 4.1, 4.6, 4.27, http://www.albany.edu/sourcebook/1995/tost_4.html; *see also Ruiz*, 536 U.S. at 632 (observing that vast majority (90%) of federal convictions result from plea bargains); *Timmreck*, 441 U.S. at 784 (vast majority); *Brady*, 397 U.S. at 752 n.10 (90%-95% of all criminal convictions); Leonidas Ralph Mecham, *Judicial Business of the United States Courts: 1997 Report of the Director* 214 (51,647 of 55,648 defendants pleaded guilty).

2. The benefits of a separate, lengthy waiver of counsel colloquy are limited, particularly for simple offenses.

These unnecessary systemic costs will not uniformly improve the criminal justice system or substantially advance defendants' rights. A litany will not ensure a defendant's understanding. *Hill*, 252 F.3d at 928. It will not stem the flow of appeals, but rather offer another peg on which to hang reversible error. *See State v. White*, 587 N.W.2d 240, 247 (Iowa 1998) (Harris, J., dissenting) ("It is a mistake to answer the siren call of those who suggest that our imposition of more litany will clarify the requirements, so that future mistakes with consequent appeals can be avoided. Every requirement invites more litigation and appeals in order to test whether there has been compliance.").

Besides, in the context of guilty pleas, to say that an attorney can help in the decision whether to plead guilty or can uncover defenses offers something that surely the public knows already. *See Nichols*, 511 U.S. at 748 (upholding use of prior guilty plea despite fact court did not say it could enhance later offense, as it is something defendants surely know already).

The inquiry crafted below may also create an incentive to plead guilty without an attorney, in the hope that the conviction could not be used later. *See State v. Moe*, 379 N.W.2d 347, 349 (Iowa 1985) ("First offense OWI defendants could simply exercise their constitutional right not to be represented by counsel and thus avoid conviction at a later time of second or third offense OWI because their prior convictions were in fact uncounseled.").

3. Pleading guilty to a misdemeanor traffic offense without an attorney can work to a defendant's advantage, suggesting that a wooden rule requiring reversal for lack of a separate waiver colloquy is unnecessary.

Although the State of Iowa has no preference for uncounseled guilty pleas, sometimes defendants benefit from forgoing an attorney when pleading guilty to a first-time misdemeanor:

> [P]robably the vast majority of citizens haled into court on traffic violations share the judge's interest in prompt disposition of their cases, feeling themselves sufficiently inconvenienced by having to make personal appearances in the first place.

In re Johnson, 398 P.2d 420, 427 (Cal. 1965).

Numerous legitimate personal reasons exist for a defendant's choice to expeditiously accept responsibility for a minor traffic offense by entering an unbargained-for guilty plea *pro se* at arraignment. For some people, "their breach of a State's law is alone sufficient reason for surrendering themselves and accepting punishment." *Brady*, 397 U.S. at 750. The "admissio[n] of guilt . . . if not coerced, [is] inherently desirable." *United States v. Washington*, 431 U.S. 181, 187 (1977); *accord Santobello v. New York*, 404 U.S. 257, 260 (1971) (properly administered, pleas are to be encouraged).

A number of positive effects flow from this admission:

> The defendant avoids extended pretrial incarceration and the anxieties and uncertainties of a trial; he gains a speedy disposition of his case, the chance to acknowledge his guilt, and a prompt start in realizing whatever potential there may be for rehabilitation.

Corbitt v. New Jersey, 439 U.S. 212, 223 n.12 (1978).

Defendants decide to plead guilty without an attorney for more pedestrian reasons as well. Some people mistrust lawyers, do not wish to share the spotlight, believe they are more intense or sincere than a lawyer, or feel attorneys are not worth the expense, particularly where the defendant has already some experience with the criminal justice system. *See, e.g., United States v. Dougherty*, 473 F.2d 1113, 1128-29 (D.C. App. 1972); Marie Higgins Williams, Comment, *The Pro Se Criminal Defendant, Standby Counsel, And The Judge: A Proposal For Better-Defined Roles*, 71 U. COLO. L. REV. 789, 816-17 (2000); *see also* Anthony T. Kronman, *Professionalism*, 2 J. INST. FOR STUDY LEGAL ETHICS 89, 94 (1999) (noting public's low regard for lawyers).

The choice to acknowledge guilt without the delay and expense of hiring counsel should be honored "out of 'that respect for the individual which is the lifeblood of the law.'" *Faretta*, 422 U.S. at 834 (quoting *Illinois v. Allen*, 397 U.S. at 350-51 (Brennan, J., concurring)); *accord Godinez*, 509 U.S. at 400. The choice is all the more honorable since the defendant is the one who suffers the consequences of his actions. *Faretta*, 422 U.S. at 819-20.

Courts should not discourage the ready, unqualified admission of guilt by holding out the prospect of a technical defense, such as a suppression issue in an OWI case, which as the Iowa Supreme Court observed may be the only promising defense. Requiring expression of this notion undermines a key value served by admission of guilt in open court, the chance to unreservedly accept

blame for one's wrongs. *See* Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values And Criminal Procedure: The Case of* Alford *and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1363 (2003).

A valid guilty plea assures the defendant's actual guilt of the charged crime, knowledge of the consequences, and the absence of coercion. Requiring in all cases a separate colloquy which suggests that an attorney could help the defendant avoid culpability can hinder the process of contrition, rehabilitation and reform by facilitating the defendant's state of denial. *See id.* at 1397, 1404-06; *see also* U.S. Sentencing Commission, Guidelines Manual § 3E1.1 (2002) (conferring sentence reductions where the defendant accepts responsibility, including by promptly pleading guilty).

A "wooden rule" requiring reversal is not always necessary. *Mickens v. Taylor*, 535 U.S. 162, 176 (2002) (Kennedy, J., concurring). It is not necessary where the defendant receives a full and valid guilty plea advisory. The absence of a broader discussion of the merits of representation should not require either reversal of the plea or nullification of the conviction for enhancement purposes.

D. Tovar's 1996 Guilty Plea Colloquy Illustrates The Wisdom Of Sixth Amendment Waiver Principles And Shows The Iowa Supreme Court's Interpretation Of The Sixth Amendment Should Not Stand.

In 1996, Tovar faced a minor, easily understood charge of operating while intoxicated. Since he was not indigent, he had a right to hire counsel of his choice. *See Wheat v. United States*, 486 U.S. 153, 159 (1988) (noting Sixth

Amendment right to hire attorney of choice); *see* J.A. 46. By waiving application for appointed counsel, the record shows his awareness of the right to appointed counsel and his affirmatively stated desire to waive. J.A. 8-9, 46. He further understood his right to the assistance of counsel at trial. *Id.* at 16. He knew the elements of the offense, its possible penalties, the presumption of innocence, the standard of reasonable doubt, the subpoena power, the privilege against self-incrimination, and the right of confrontation. *Id.* at 16-19. He conceded he had no quarrel with the evidence of his blood alcohol concentration. *Id.* at 23-24. No legal reason warranted rejecting the plea. *Id.* at 28. He did not assert his innocence by challenging the guilty plea, either by motion in arrest of judgment before sentencing or by direct appeal in 1996. (Nor, apparently, did make a collateral attack at the time of his second OWI offense in 1998.)

A plea of guilty is a solemn act, accepted only with care and discernment. *Brady*, 397 U.S. at 748. That occurred here. The 1996 guilty plea record here stands unblemished by prosecutorial or police misconduct or by judicial error. To paraphrase *United States v. Hyde*, Tovar was pleading guilty because he *was* guilty. 520 U.S. 670, 676 (1997).

The Story County Court in 1996 discharged its responsibility and accepted Tovar's "solemn admission 'in open court that he is in fact guilty.'" *Henderson*, 426 U.S. at 648 (quoting *Tollett*, 411 U.S. at 267). Nullifying that conviction because the 1996 court failed to employ a litany suggested in 2003 diminishes the gravity of pleading guilty. Tovar has never claimed that he was innocent of drunk driving in 1996. To nullify a prior conviction here creates a windfall for unquestionably guilty defendants

who entered knowing and voluntary guilty pleas without counsel.

The Sixth Amendment does not mandate a separate *Faretta*-type colloquy disclosing the "dangers and disadvantages of self-representation" or the benefits of retaining counsel when the defendant is already engaged in a detailed plea colloquy. The Sixth Amendment does not require nullification of a prior conviction for enhancement purposes where the plea-taking court elected not to employ such a specific colloquy. It is not strictly necessary to inform a defendant that technical defenses might exist or that without counsel a person loses the opportunity for an independent opinion on the wisdom of pleading guilty. *See* Pet. App. 18. Advising a defendant that an attorney can be useful merely "tell[s] him what he must surely already know." *Nichols*, 511 U.S. at 748. In the exercise of discretion, declining to do so ought not be reversible error.

In short, the Sixth Amendment does not require this advisory when a defendant enters an otherwise valid guilty plea. Conversely, nullifying facially valid pleas grants unwarranted relief to those who do not assert they are innocent, imposes unnecessary costs on a poorly equipped system, and mutes the call for recidivists to account for their crimes.

CONCLUSION

The State of Iowa respectfully urges this Court to reverse the ruling of the Iowa Supreme Court and uphold Tovar's conviction for Third Offense Operating While Intoxicated.

Respectfully submitted,

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APPENDIX

Iowa Rule of Criminal Procedure 8 (1992)

1. Conduct of Arraignment. Arraignment shall be conducted as soon as practicable.

2. Pleas to the indictment or information.

a. In general. A defendant may plead guilty, not guilty, or former conviction or acquittal. If the defendant fails or refuses to enter a plea at arraignment, or if the court refuses to accept a guilty plea, the court shall enter a plea of not guilty. At any time before judgment, the court may permit a guilty plea to be withdrawn and a not guilty plea substituted.

b. Pleas of guilty. The court may refuse to accept a plea of guilty, and shall not accept a plea of guilty without first determining that the plea is made voluntarily and intelligently and has a factual basis. Before accepting a plea of guilty the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:

(1) The nature of the charge to which the plea is offered.

(2) The mandatory minimum punishment, if any, and the maximum possible punishment provided by the statute defining the offense to which the plea is offered.

(3) That the defendant has the right to be tried by a jury, and at trial has the right to assistance of counsel, the right to confront and cross-examine witnesses against the defendant, the right not to be compelled to incriminate oneself, and the right to present witnesses in the defendant's own behalf and to have compulsory process in securing their attendance.

(4) That if the defendant pleads guilty there will not be a further trial of any kind, so that by pleading guilty the defendant waives the right to a trial.

The court may, in its discretion and with the approval of the defendant, waive the above procedures in a plea to a serious or aggravated misdemeanor.

Iowa Code § 321J.1 (1995)
Definitions.

As used in this chapter unless the context otherwise requires:

1. *"Alcohol concentration"* means the number of grams of alcohol per any of the following:

a. One hundred milliliters of blood.

b. Two hundred ten liters of breath.

* * *

Iowa Code § 321J.2 (1995)

1. A person commits the offence of operating while intoxicated if the person operates a motor vehicle in this state in either of the following conditions:

a. While under the influence of an alcoholic beverage or other drug or a combination of such substances.

b. While having an alcohol concentration as defined in section 321J.1 of .10 or more.

2. A person who violates this section commits:

a. A serious misdemeanor for the first offense and shall be imprisoned in the county jail for not less than forty-eight hours to be served as ordered by the court, less credit for any time the person was confined in a jail or detention facility following arrest, and assess a fine of not less than five hundred dollars nor more than one thousand dollars. . . . The court may accommodate the sentence to the work schedule of the defendant.

States That Do Not Require A Separate Waiver Of Counsel Colloquy, As Required By The Iowa Supreme Court

State v. Natoli, 764 P.2d 10, 11-12 (Ariz. 1988) (holding that OWI guilty plea will not be overturned on collateral attack where defendant had been advised of right to counsel and waived it and record appears otherwise valid on its face).

King v. State, 804 S.W.2d 360, 362 (Ark. 1991) (record that defendant waived "his right to consult with an attorney" created presumption that earlier guilty plea to OWI was valid and could be used for enhancement).

People v. Paradise, 166 Cal. Rptr. 484, 488 (Cal. Ct. App. 1980) (noting an ever increasing and time consuming burden on courts to "intone ritualistic incantations," a separate "dangers and disadvantages of self-representation" is not necessary if entire record shows defendant waived counsel with "eyes open").

People v. Torres, 157 Cal.Rptr. 560, 563 (Cal. Ct. App. 1979) ("Where the misdemeanor charged is simple and the exposure to punishment is slight then the arraigning judge may accept waiver of counsel without first advising that self-representation is unwise.").

King v. State, 486 S.E.2d 904, 910-11 (Ga. Ct. App. 1997) (signed waiver of counsel before non-negotiated plea to traffic offense suffices) *overruled on other grounds by King v. State*, 509 S.E.2d 32, 37 (Ga. 1998) (invoking court's supervisory power to require verbatim record).

State v. Merino, 915 P.2d 672, 696-97 (Haw. 1996) (given scrupulous adherence to guilty plea colloquy, court need

not go into potential defenses and circumstances in mitigation).

State v. Maxey, 873 P.2d 150, 153-54 (Idaho 1994) (judgments confronting misdemeanor DUI defendant are not sufficiently complex to require separate discussion of dangers and disadvantages of self-representation).

People v. Christensen, 555 N.E.2d 422, 426 (Ill. Ct. App. 1990) (upholding waiver where defendant received valid guilty plea colloquy, including advisory of charges, punishments, and right to counsel).

Redington v. State, 678 N.E.2d 114, 118 (Ind. Ct. App. 1997) (holding court need not advise defendant of "pitfalls of self-representation").

State v. Strain, 585 So.2d 540, 543-44 (La. 1991) (holding that plea judge need not discuss "dangers and disadvantages" because "[t]he crime of driving while intoxicated is a non-complex crime, even among misdemeanors, and is almost self-explanatory.").

Guillemette v. Commonwealth, 377 N.E.2d 945, 948-49 (Mass. 1978) (upholding waiver where defendant did not undermine record evidence he knew right to counsel and waived it).

People v. Gonzales, 446 N.W.2d 296, 298-99 (Mich. Ct. App. 1989) (allowing enhancement of drunk driving offense based on prior plea where defendant understood right to counsel, waived it, and entered guilty plea).

State v. Shafer, 969 S.W.2d 719, 729 (Mo. 1998) (noting "[i]t is not necessary that the defendant be questioned as to all of the things counsel might be able to assist the defendant in the legal processes to follow"). *But see Shafer*

v. Bowersox, 329 F.3d 637, 648 (8th Cir. 2003) (granting *habeas* for failure to apply standards of *Faretta*).

State v. Wolfe, 75 P.3d 1271, 1272-73 (Mont. 2003) (in enhancement case, holding "dangers and disadvantages" discussion in DUI case not necessary so long as waiver is knowing and voluntary).

State v. Werner, 600 N.W.2d 500, 506-07 (Neb. 1999) (holding waiver form listing elements of DUI offense, punishments and right to counsel showed knowing and intelligent waiver).

State v. Montler, 509 P.2d 252, 252-54 (N.M. 1973) (plea colloquy revealed knowing and intelligent waiver of counsel).

State v. Fulp, 558 S.E.2d 156, 159-60 (N.C. 2002) (holding waiver valid if defendant is made aware of right to counsel and appreciates consequences of waiver, charges, and range of punishments).

State v. Hendrick, 543 N.W.2d 217, 221-22 (N.D. 1996) (holding in enhancement case that court looks to totality of circumstances to assess waiver).

Fitzgerald v. State, 972 P.2d 1157, 1163-64 (Okla. 1998) (holding that under totality of circumstances, defendant's waiver was valid because he was aware of nature of charges, and range of punishments and that self-representation was "a bad decision").

State v. Cashman, 491 N.W.2d 462, 465 (S.D. 1992) (holding that dangers and disadvantages of self-representation are more obvious at a guilty plea to DUI since defendant is fully advised of charges, rights, and punishments).

Hatten v. State, 71 S.W.3d 332, 333-34 (Tex. Ct. Crim. App. 2002) ("dangers and disadvantages" warning inapplicable when defendant does not contest guilt to misdemeanor assault).

State v. Arguelles, 63 P.3d 731, 750 (Utah 2003) (for self-representation at penalty phase, court should advise of right to counsel, ascertain that defendant can comply with rules and recognizes that a defense is not simply matter of telling one's story, inform defendant of charges, and range of punishments).

Murphy v. State, 592 P.2d 1159, 1164 (Wyo. 1979) (upholding waiver where court informed defendant of right to appointed counsel and defendant asserted he understood what he was doing).